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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

ADAM WEISBLATT, JOE HANNA, and DAVID TURK, and COLETTE OSETEK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

APPLE, INC., AT&T MOBILITY LLC, and Does 1-10,

Defendants.

Case Nos. 5:10-cv-02553; 5:10-cv-02588; 5:10-cv-04253

CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF AT&T MOBILITY LLC TO DISMISS MASTER CONSOLIDATED COMPLAINT

Date: March 18, 2011
Time: 9 a.m.
Place: Courtroom 6, 4th Floor

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INTRODUCTION

The Master Consolidated Complaint ("MCC") spins out plaintiffs' theory that when AT&T Mobility LLC ("ATTM") offered a "no long-term contract" unlimited data plan for the 3G-enabled iPad, ATTM allegedly misrepresented that it would provide that unlimited data plan at all times into the future. Yet plaintiffs do not identify a single alleged misrepresentation by ATTM concerning the future availability of the unlimited data plan. And, none of the named plaintiffs allege that they ever saw or heard or relied on *anything* ATTM said about the unlimited data plan. Plaintiffs' claims therefore should be dismissed on the following grounds.[1]

First, all of the common law and statutory claims rest on the same averments of fraud and must meet the heightened pleading requirements of Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009). Plaintiffs do not meet those requirements because they allege no specific misrepresentation by ATTM.

Second, all of the common law and statutory claims grounded in fraud must allege the element of reliance. Plaintiffs do not allege that they relied on any statements by ATTM to make their decision to purchase a 3G-enabled iPad. Plaintiffs cannot satisfy their duty to plead reliance as to ATTM through reliance allegations directed at Apple.

Third, plaintiffs Adam Weisblatt, David Turk and Colette Osetek lack standing to assert their claims under California's CLRA, UCL and FAL because they are non-California plaintiffs suing a non-California defendant for conduct occurring outside California.

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[1] In the underlying *Weisblatt* action, the Court previously denied without prejudice ATTM's Motion To Compel Arbitration Or, In The Alternative, To Stay The Case ("Motion To Compel"). The Court indicated that it was doing so in order to await the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, No. 09-893; accordingly, it held that discovery would be limited to written discovery relevant to claims against Apple. *See* Order On Defendant AT&T Mobility's Motion To Compel Arbitration Or, In The Alternative, To Stay Case, filed on October 18, 2010 (*Weisblatt* Doc. No. 50). Pursuant to stipulated order, the *Weisblatt* Order is fully binding on the parties to this consolidated action, and ATTM's right to seek to compel arbitration, as well as all arguments raised in the *Weisblatt* and *Logan* actions, are deemed to have been raised and preserved in all of the consolidated actions. *See* Stipulation and Order For Consolidation Pursuant To Fed. R. Civ. P. 42, filed December 15, 2010 (Doc. No. 66) ("Consolidation Order"). ATTM respectfully submits that the Court should defer ruling on this Motion To Dismiss until the Supreme Court decides *Concepcion*. Once the Supreme Court announces its decision in *Concepcion*, ATTM will again seek to compel each plaintiff to arbitrate his or her claims under the terms of the arbitration agreements between plaintiffs and ATTM.

Fourth, the purported claim for unjust enrichment fails. As to plaintiff Hanna, there is no cause of action in California for unjust enrichment. The laws of Weisblatt, Turk and Osetek's home states do not permit unjust enrichment claims where the relationship between the parties is governed by contract. Moreover, none of the plaintiffs allege how ATTM was purportedly unjustly enriched by plaintiffs' decision to pay Apple (or in one case, Best Buy) $130 more for a 3G-enabled iPad.

Fifth, only plaintiffs who are entitled to restitution have standing to sue under the UCL and FAL. Plaintiffs are not entitled to restitution from ATTM for money they paid to Apple or Best Buy.

Sixth, plaintiff Weisblatt's claim for negligent misrepresentation fails because he cannot show a special relationship with ATTM as required under New York law.

Seventh, the CLRA claims are deficient because none of the plaintiffs filed the supporting affidavit required by California Civil Code section 1780(d). Further, the CLRA claim for damages by plaintiff Osetek is deficient because she failed to serve a notice of violation letter on ATTM, as required by California Civil Code section 1782(a).[2]

STATEMENT OF ISSUES

1. Whether all claims should be dismissed for failure to satisfy Rule 9(b).
2. Whether all claims should be dismissed for failure to plead the element of reliance as to ATTM.
3. Whether the claims under California's CLRA, UCL and FAL should be dismissed

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[2] In addition, although Stuart Logan is the only named plaintiff in the underlying *Logan* complaint, there are no allegations in the MCC concerning him, nor is he named as a plaintiff in the MCC. Accordingly, ATTM respectfully asks that the Court dismiss the *Logan* action and any claims by Logan. *See Harris v. Auxilium Pharms., Inc.*, 664 F. Supp. 2d 771, 772 (S.D. Tex. 2009), *vacated on other grounds* 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010) (party not named in caption is not a party to the action); *In re Am. Investor Life Ins. Co. Annuity Mktg. and Sales Practices Litig.*, 2010 WL 1407308 *4 (E.D. Pa. April 7, 2010) (party excluded from consolidated complaint deemed dropped from case). The MCC also purports to state claims by plaintiff Osetek against ATTM, which is inconsistent with her underlying amended complaint that names only Apple as a defendant, and with her prior statement that her claims do not involve ATTM. Opp'n to Motion to Consider Whether Cases Should Be Related, at 2:18-19; 3:3-4 (*Weisblatt* Doc. No. 48). In a separate Motion to Strike, filed concurrently with this Motion, ATTM requests that the Court strike all claims by Osetek against ATTM. In the event the Motion to Strike is denied, ATTM also moves to dismiss Osetek's claims on the grounds set forth here.

as to non-California plaintiffs Weisblatt, Turk and Osetek because they lack standing to sue ATTM, a non-California defendant, for conduct allegedly occurring outside California.

4. Whether the unjust enrichment claim should be dismissed because it fails under applicable state law, and because plaintiffs fail to allege how ATTM was unjustly enriched at plaintiffs' expense.

5. Whether the claims under the UCL and FAL should be dismissed because plaintiffs are not entitled to restitution from ATTM and thus lack standing to assert claims under those statutes against ATTM.

6. Whether plaintiff Weisblatt's claim for negligent misrepresentation should be dismissed because he cannot show a special relationship with ATTM as required by New York law.

7. Whether the claims under California's CLRA should be dismissed as to all plaintiffs for failure to comply with the affidavit and/or notice requirements.

BACKGROUND

This consolidated proceeding comprises putative class actions brought by individuals who purchased Apple Inc.'s ("Apple's") 3G-enabled iPads. Three separate actions were filed in the Northern District of California between June and September 2010.[3] Pursuant to stipulation and this Court's December 15, 2010 Order (Doc. No. 66), those three actions were consolidated under Federal Rule of Procedure 42(a), and plaintiffs filed a master consolidated complaint ("MCC") on December 10, 2010. The sole plaintiff in one of the underlying actions, *Logan*, has dropped out of the case; the MCC does not name him as a plaintiff and contains no allegations supporting claims by him.

Plaintiffs allege that on or around April 30, 2010, Apple began selling 3G-enabled iPads, with ATTM as the exclusive provider of 3G data service. MCC at ¶ 25. The 3G-enabled iPads cost approximately $130 more than "Wi-Fi" iPads without 3G capability. *Id.* at ¶ 26. Unlike the Wi-Fi iPads, the 3G-enabled iPads can connect to the internet without the need to be within range of a wireless internet "hotspot." *Id.* at ¶ 23.

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[3] *Weisblatt, et al. v. Apple Inc., et al.* (Case No. 5:10-cv-02556) ("*Weisblatt* action"); *Logan v. Apple Inc., et al.* (Case No. 5:10-cv-02588) ("*Logan* action"); *Osetek v. Apple, Inc.* (Case No. 5:10-cv-04253) ("*Osetek* action").

Plaintiffs allege that between April 30, 2010 and June 7, 2010, ATTM offered two 3G data plan options: 250 MB of data for $14.99 per month, with additional data available for an added charge, or an unlimited data plan for $29.99 per month. *Id.* at ¶ 29. Plaintiffs further allege that on June 7, 2010, ATTM ceased offering the unlimited data plan, and began offering instead a less expensive plan with two gigabytes ("GB") of data available per month. *Id.* at ¶¶ 42-43; Ex. E to MCC. Plaintiffs acknowledge that customers who had already signed up for an unlimited data plan as of June 7, 2010 could maintain that plan until they chose to discontinue it, at which time the unlimited plan would no longer be available to them. *Id.* at ¶¶ 42, 44. Plaintiffs contend that by describing the data plan options that were initially available, ATTM misrepresented that customers would be able to switch back and forth between limited and unlimited data plans at all times in the future, and that those alleged misrepresentations induced plaintiffs into paying Apple (or in one case, Best Buy) an additional $130 for the 3G-enabled iPad. *See id.* at ¶¶ 1-4, 53, 61, 68, 78.

Plaintiffs purport to state common law claims of intentional and negligent misrepresentation, fraud and unjust enrichment. *Id.* at ¶¶ 93-133, 170-175. They also purport to state claims under California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*, unfair competition law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and false advertising law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq*. *Id.* at ¶¶ 134-169. All claims are grounded in the same allegations of misrepresentations concerning the future availability of unlimited data plans for the 3G-enabled iPad. *Id.* at ¶¶ 93-169. Plaintiffs seek compensatory and punitive damages, injunctive relief, restitution, pre- and post-judgment interest and attorneys' fees and costs. *Id.* at Prayer for Relief at 31-32.

Plaintiffs identify two statements by ATTM that they contend were false: a screenshot of ATTM's website and a "fact sheet" that plaintiffs contend ATTM released on January 27, 2010. *Id.* at ¶¶ 27, 35, 36, 49. Both statements describe the data plan offerings that were available until June 7, 2010. Plaintiffs concede that both statements indicated that the offerings involved no long-term contract. *Id.* at ¶¶ 35, 36; *see also id.* at ¶ 27. They do not allege facts showing that either statement was false at the time it was made. *Id.* at ¶¶ 35, 36. They do not allege that either statement was a promise that the "no long-term contract" unlimited data plan option would remain available for any specific period. They do not allege that any of the named plaintiffs construed either statement as promising the unlimited data plan would remain available for any specific period. *Id.* at ¶¶ 27, 35.

Plaintiffs make a number of general allegations that "defendants" "heavily trumpeted" the unlimited 3G data plan as a "key feature" of the iPad. *Id.* at ¶¶ 30, 32-34. They provide no specifics about what ATTM allegedly said, when it allegedly said it, or where it allegedly said it, and instead rely on quoted statements by Apple about the unlimited data plan. *Id.* at ¶¶ 30, 34.

Plaintiffs similarly allege that on or around June 4, 2010, "defendants" falsely reassured consumers that they would still be able to initially sign up for the unlimited data plan if they ordered their 3G-enabled iPads before June 7, 2010, even if they received their iPads after that date. *Id.* at ¶ 51. Again, plaintiffs do not allege specifics about what ATTM purportedly said, or where ATTM purportedly made the statement, and do not allege any facts showing that ATTM denied consumers who ordered their 3G-enabled iPads before June 7, 2010, the ability to initially sign up for the unlimited data plan. Further, none of the named plaintiffs allege that they had that experience. *Id.* at ¶¶ 53, 61, 68, 74, 78. In fact, plaintiff David Turk purchased his third iPad on May 18, 2010, received it on June 5, and successfully signed up for an unlimited data plan on June 20. *Id.* at ¶¶ 69, 74.

Plaintiffs do not allege that they relied on any statements by ATTM in making their purchase decisions, and do not allege that they saw, heard or were in any way exposed to anything ATTM said about the unlimited data plan before they purchased their iPads. Weisblatt based his decision to purchase a 3G-enabled iPad on "representations on Apple's website and in various industry publications," as well as statements by a salesperson at the Apple store where he made his purchase. *Id.* at ¶¶ 54-56. Plaintiffs Hanna, Turk and Osetek researched the 3G-enabled iPad on Apple's website, and made their purchasing decision based on representations they saw, "including on Apple's website." *Id.* at ¶¶ 62-63, 70-71, 79-80.

Plaintiffs acknowledge that non-California plaintiffs Weisblatt, Turk and Osetek signed up for ATTM's 3G service for their iPads. MCC at ¶¶ 57, 72, 74, 81. To activate ATTM's wireless data service on the iPad, a customer must agree to ATTM's "Session Based Wireless Data Services Agreement" ("Services Agreement"), which includes a choice of law provision stating that all disputes involving ATTM are governed by the law of the state of the consumer's address. Declaration of Kimberly D. Eubank in Support of ATTM's Motion To Compel Arbitration And To Dismiss Claims Or, In The Alternative, To Stay The Case, dated Aug. 10, 2010 (Doc. No. 25) ("Eubank Decl."), at ¶ 4 & Ex. 2 (Doc. No. 25-2) at 15 ("In the event of a dispute between us, the law of the state of your address at the time the dispute is commenced, whether in litigation or arbitration, shall govern . . . ."). Weisblatt is a citizen of New York (MCC at ¶ 11), Turk is a citizen of Washington (MCC at ¶ 13), and Osetek is a citizen of Massachusetts (MCC at ¶ 14). The only plaintiff who is a citizen of California is Hanna. MCC at ¶ 12.

LEGAL STANDARDS

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1988). Although the Court must accept all well-pleaded facts as true, it need not accept as true conclusory allegations, unreasonable inferences, unwarranted deductions of fact or legal conclusions cast as factual allegations, if those conclusions cannot be reasonably drawn from the facts alleged. *E.g.*, *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). Courts do not assume that a plaintiff can prove facts it has not alleged, or facts different from those it has alleged. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983); *see also Richards v. Harper*, 864 F.2d 85, 88 (9th Cir. 1988) ("We do not supply essential elements of a claim that were not initially pleaded.").

To survive a motion to dismiss, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 557); *see also Twombly*, 550 U.S. at 545 ("a plaintiff's obligation to provide the 'grounds' of his 'entitle [ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

ARGUMENT

I. All Claims Fail Because Plaintiffs' Allegations Do Not Satisfy Rule 9(b).

A. Rule 9(b) Requires The Who, What, When, Where And How Of The Alleged Conduct.

Federal Rule of Civil Procedure 9(b) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). Under Rule 9(b), all "[a]verments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quote omitted). This Rule 9(b) requirement applies to plaintiffs' common law claims for intentional and negligent misrepresentation, fraud and unjust enrichment (Claims 1-3, 7), as well as to their California statutory claims under the CLRA, UCL and FAL (Claims 4-6), because all are based on same alleged misrepresentation regarding the unlimited data plan MCC at ¶¶ 140, 153, 163, 171-172.

B. Under *Kearns*, All Claims Must Meet The Requirements Of Rule 9(b).

Plaintiffs cannot evade the requirements of Rule 9(b) by raising state common law or statutory claims. In *Kearns*, the Ninth Circuit held that Rule 9(b) requires all "averments of fraud" to be pled with particularity "irrespective of whether the substantive law at issue is state or federal," and even where "fraud is not an essential element of a claim." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009). The Ninth Circuit specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL. *Id.* at 1125. In so ruling, it recognized that "fraud [was] not a necessary element of a claim under the CLRA and UCL," but explained that where, as here, a plaintiff's claim is "grounded in fraud" or "sounds in fraud," the pleading must satisfy the particularity requirement of Rule 9(b). *Id.*; *see also Vess*, 317 F.3d at 1104 (explaining that all averments of fraud are subject to Rule 9(b), even if plaintiff's claim does not rest solely on a fraudulent course of conduct).

Following *Kearns*, district courts in California have held that claims under California's FAL are equally subject to Rule 9(b). *See, e.g.*, *Herrington v. Johnson & Johnson Consumer Co., Inc.*, 2010 WL 3448531 *7 (N.D. Cal. Sept. 1, 2010) (dismissing UCL, CLRA and FAL claims for failure to satisfy Rule 9(b)); *Saba v. Caplan*, 2010 WL 2681987 *4 (N.D. Cal. July 6, 2010) (dismissing UCL and FAL claims for failure to satisfy Rule 9(b)). Negligent misrepresentation and unjust enrichment claims based on fraud are also subject to Rule 9(b). *E.g.*, *Glenn Holly Entm't., Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999); *Stewart v. Mortgage Elec. Registration Sys., Inc.*, 2010 WL 1054384 *11 (D. Or. Feb. 18, 2010).

C. None Of Plaintiffs' Allegations Of Misrepresentations By ATTM Meet The Specificity Requirement.

To avoid dismissal under Rule 9(b)," a "complaint [must] state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (internal quotations omitted). In addition, "[t]he plaintiff must set forth what is false or misleading about a statement, and why it is false." *Vess*, 317 F.3d at 1106 (internal quotation omitted).

The crux of plaintiffs' claims is that ATTM falsely represented the "continued availability" of the unlimited data plan. MCC at ¶ 40; *see also id.* at ¶¶ 4, 41. Plaintiffs cite only two representations by ATTM, neither of which supports plaintiffs' claims.

First, plaintiffs quote a screenshot of ATTM's website. On its face, that statement describes the two data plan options available at the time the screenshot was made:

> AT&T offers two data plan options—250MB or unlimited data, with recurring monthly charge and no long-term contract. To help you manage your data with a 250 MB plan, iPad will notify you at 20%, 10%, and when there's no more data available, so you can decide if you want to add more data or upgrade to an unlimited data plan.

Id. at ¶ 35 (quoting Ex. B to MCC); *see also id.* at ¶ 27 (referring to Ex. B). Plaintiffs do not and cannot reasonably allege that the above statement—which states that both data plans involve "no long-term contract"—was a promise by ATTM that it would make the unlimited data plan option available in perpetuity, or that any of the named plaintiffs construed it as such. *Id.* at ¶¶ 27, 35.

Plaintiffs also do not specifically allege *when* ATTM made the above statement, or allege facts showing that the statement was false at the time it was made, as required by Rule 9(b). *See e.g.*, *Ronconi v. Larkin*, 253 F.3d 423, 431 (9th Cir. 2001) (affirming dismissal where plaintiff failed to allege facts showing that statement was false when made). At most, plaintiffs allege that the statement somehow became "completely false" during the period between June 2, 2010, when ATTM announced that it would change its data plan offerings, and June 7, 2010, when those changes took effect.[4] MCC at ¶¶ 49, 51. That allegation cannot support plaintiffs' fraud or fraud-based claims, however, because each of the plaintiffs purchased their iPad units before June 2, 2010 (and plaintiffs do not allege that they relied on anything ATTM said about its data plan offerings). MCC at ¶¶ 53, 61, 68, 78; *see, e.g.*, *Poulos v. Ceasars World, Inc.*, 379 F.3d 654, 665 (9th Cir. 2004) (allegations of "misrepresentations standing alone have little legal significance," absent reliance, which "provides a key causal link."). The allegations show only that ATTM continued to truthfully describe the data plan options available during the period between June 2, 2010 and June 7, 2010. MCC at ¶¶ 43, 49, 51. Plaintiffs do not allege that ATTM falsely advertised the availability of the unlimited data plan *after* it changed its data plan offerings on June 7, 2010, and plaintiffs concede that customers who signed up for the unlimited data plan *before* it was discontinued can keep the plan.[5] *Id.* at ¶ 44.

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[4] Plaintiffs also allege that "defendants" made unspecified representations some time "between January 27, 2010 and June 7, 2010." MCC at ¶ 41. Plaintiffs do not allege whether these "representations" include the screenshot of ATTM's website, but even if they did, the allegation would not satisfy plaintiffs' burden of alleging the timing of the misrepresentations. The timing of the misrepresentations is "particularly important" under Rule 9(b), and plaintiffs cannot satisfy the rule's requirement by vaguely alleging a broad period of time in which the misrepresentation may have occurred. *See U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1057 (N.D. Cal. 1991) ("Allegations such as '[d]uring the course of discussions in 1986 and 1987,' 'in or about May through December 1987,' and 'May 1987 and thereafter' . . . do not make the grade.").

[5] Plaintiffs' allegation that on June 4, 2010, "defendants" falsely reassured consumers that the unlimited data plan would be available for those who ordered a 3G-enabled iPad before June 7, 2010, but who received it after that date, also does not support a fraud claim. *Id.* at ¶ 51. (Continued…)

Second, plaintiffs attempt to rely on a January 27, 2010 "fact sheet" that, like ATTM's website, described the "no long term contract" data plans initially made available for the 3G-enabled iPad units. *Id.* at ¶ 36. Plaintiffs quote that fact sheet as saying, "'Once you sign up for the iPad 3G data service, you can add or cancel your domestic plan at any time—no penalty.'" *Id.* (quoting Ex. D.) That statement, however, concerns the renewal of data plans in general.[6] It furnishes no support for fraud or fraud-based claims because plaintiffs do not allege how the statement misrepresents the "continuing availability" of the unlimited data plan, as they must to state a claim. *See Vess*, 317 F.3d at 1106.

Lacking any misrepresentations by ATTM, plaintiffs attempt to bootstrap liability to ATTM by quoting alleged misrepresentations by Apple, and contending in a conclusory fashion, without any supporting factual allegations, that ATTM made similar unspecified statements. *See* MCC at ¶¶ 27, 30, 34. Those allegations are insufficient because they lump the two defendants together and are not specific as to ATTM. *See Roque v. Suntrust Mortg., Inc.*, 2010 WL 546896, *6 (N.D. Cal. Feb. 10, 2010) ("Rule 9(b) 'does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant.'") (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007)). Plaintiffs cannot rely on allegations against Apple to cure their deficient allegations against ATTM. *See Swartz*, 476 F.3d at 764-65 ("With respect to Presidio and DB, the allegations in [the] complaint patently fail to comply with Rule 9(b). The complaint is shot through with general allegations that the 'defendants' engaged in fraudulent conduct but attributes specific

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The allegation is not pled with specificity as to each defendant, and is supported by no facts as to what ATTM said, or where ATTM purportedly said it. *See Swartz*, 476 F.3d at 764-65. None of the plaintiffs could have relied on alleged assurances made on June 4 because they all purchased their iPads before that date. *See Poulos*, 379 F.3d at 665. Plaintiffs do not allege any facts showing that the reassurances were false; indeed, plaintiff Turk purchased his third iPad on May 18, 2010, and was able to sign up for an unlimited plan on June 20, *after* it was discontinued for consumers who purchased iPads after June 7. MCC at ¶ 74.

[6] The paragraph containing the quote states, in full: "Once you sign up for the iPad 3G data service, you can add or cancel your domestic plan at any time—no penalty. For domestic plans, if you do not cancel, your service will automatically renew every 30 days to provide a more seamless data experience on an ongoing basis. For example, if you activate service on May 9, your service will automatically renew 30 days later with the same plan. If you do make a change, a new 30-day window begins." Ex. D to MCC.

misconduct only to KPMG and B & W.”).

II. All Claims Against ATTM Fail Because Plaintiffs Do Not Allege Reliance On Any Statement By ATTM.

The Ninth Circuit holds that reliance is an “essential” element of any claim for fraud or misrepresentation.[7] *Clark v. Time Warner Cable*, 523 F.3d 1110, 1116 (9th Cir. 2008); *accord Poulos*, 379 F.3d at 665. This principle holds equally true for misrepresentation claims brought under the CLRA, UCL and FAL. *Kearns*, 567 F.3d at 1126 (“Kearns also failed to specify [in CLRA and UCL claims] which sales material he relied upon in making his decision to buy [his car]”); *United Food & Commercial Workers Cent. Pennsylvania & Reg’l Health & Welfare Fund v. Amgen, Inc.*, 2010 WL 4128490 *1 (9th Cir. Oct. 21, 2010) (affirming dismissal with prejudice of UCL claim for failure to adequately allege reliance); *Herrington*, 2010 WL 3448531 at *7 (dismissing UCL, CLRA and FAL claims under *Kearns* where plaintiff failed to allege that they were exposed to and relied on misrepresentations); *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1304 (S.D. Cal. 2009) (dismissing UCL claim because “the Complaint does not allege that Plaintiff relied on representations made by Qualcomm when he purchased his cell phone or when he selected his cellular service.”); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (dismissing UCL and FAL claims where “none of the named Plaintiffs allege[d] that they saw, read, or in any way relied on the advertisements . . . .”).

Here, plaintiffs’ failure to allege reliance is a separate and independent basis to dismiss all claims against ATTM. All named plaintiffs allege that they relied on statements by Apple, not ATTM. MCC at ¶¶ 54-56, 62-63, 70-71, 79-80. Indeed, no plaintiff specifically alleges that he or she saw, heard or even knew of any purported misrepresentations by ATTM before making the decision to purchase a 3G-enabled iPad.[8] *Id.* Consistent with *Kearns* and the other applicable authority, plaintiffs' fraud-based claims are subject to dismissal because they fail to allege reliance.

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[7] Under the choice of law provisions in their contracts with ATTM, the claims alleged by Hanna, Weisblatt, Turk and Osetek are governed by the law of their home states, which are, respectively, California (MCC at ¶ 12), New York (MCC at ¶ 11), Washington (MCC at ¶ 13) and Massachusetts (MCC at ¶ 14). *See* Eubank Decl. at ¶ 4 (Doc. No. 25) and Ex. 2 (Doc. No. 25-2) at 15; *In re Detwiler*, 305 Fed. Appx. 353, 355 (9th Cir. 2008) (enforcing parties’ choice of Florida law in terms of service agreement in suit between provider and Florida customer); *see also Cooper v. Picket*, 137 F.3d 616, 622-23 (9th Cir. 1997) (“[W]hen [the] plaintiff fails to introduce a pertinent document as part of his pleading, [the] defendant may introduce the exhibit as part of his motion attacking the pleading.”) (internal quotations and citations omitted). The law of each of these states requires plaintiffs to allege and prove reliance in order to sustain fraud, intentional misrepresentation or negligent misrepresentation claims. *See, e.g.*, *Herrington*, 2010 WL 3448531 at *8-11 (applying California law); *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York*, 375 F.3d 168, 186-87 (2nd Cir. 2004) (applying New York law); *accord Kwiatkowski v. Drews*, 176 P.3d 510, 519 (Wash. App. Div. 2, 2008); *Cumis Ins. Society, Inc. v. BJ's Wholesale Club, Inc.*, 918 N.E.2d 36, 47 (Mass., 2009).

III. Non-California Plaintiffs Weisblatt, Turk And Osetek Lack Standing To Pursue CLRA, UCL And FAL Claims.

"California law embodies a presumption against the extraterritorial application of its statutes." *Churchill Village, L.L.C. v. General Elec. Co.*, 169 F. Supp. 2d 1119, 1126 (N.D. Cal. 2000); *see also Norwest Mortgage, Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 222-28 (1999) ("We ordinarily presume the Legislature did not intend the statutes of this state to have force or operation beyond the boundaries of the state."). In light of that principle, courts have made clear that the UCL, FAL and CLRA do not apply to claims brought by non-California residents for conduct occurring outside the state of California. *Norwest Mortgage*, 72 Cal. App. 4th at 222-28 (1999) (UCL does not apply to injuries suffered by non-California residents caused by conduct occurring outside California's borders); *Churchill Village*, 169 F. Supp. 2d at 1126, 1132 (UCL and FAL do not apply to non-California residents complaining of conduct occurring outside California); *Cattie v. Walmart-Stores, Inc.*, 504 F. Supp. 2d 939, 949 (S.D. Cal. 2007) ("The requirement that a non-California plaintiff has no standing to sue under the CLRA for a transaction having no connection with California is unremarkable . . . .").

Here, the CLRA, UCL and FAL claims must be dismissed as to Weisblatt, Turk and Osetek because they are non-California residents who purchased their iPad and data plans outside of California.[9] MCC at ¶¶ 11, 13, 14, 53-60, 68-84. Their attempt to concoct a connection to California by offering a conclusory allegation that unspecified representations, occurring at unspecified times, emanated from unspecified ATTM operations and employees based in California, is ineffective. *Id.* at ¶ 9. Under *Iqbal*, plaintiffs cannot expand the reach of California's statutes beyond its borders with nothing more than "threadbare" and unsubstantiated allegations. *See Iqbal*, 129 S. Ct. at 1949. Equally unavailing is plaintiffs' assertion that ATTM negotiated and entered into contracts with Apple, a California corporation. MCC at ¶ 9. The allegedly wrongful conduct at issue in the statutory consumer claims is ATTM's alleged misrepresentations, not any contracts between ATTM and Apple. *See Norwest Mortgage*, 72 Cal. App. 4th at 224-25 (extraterritorial reach of California's consumer protection statutes applies only to "wrongful conduct occurring in California").

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[8] Plaintiffs make a conclusory, boilerplate allegation that they relied on unspecified misrepresentations by unspecified "defendants." MCC at ¶¶ 40. Such allegations fail under Rule 8, as well as under the more stringent standards of Rule 9(b). *Iqbal*, 129 S. Ct. at 1949 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'") (quoting *Twombly*, 550 U.S. at 555).

IV. Plaintiffs' Unjust Enrichment Claims Fail Because No Such Claim Is Available Under The Applicable State Laws And Plaintiffs Allege No Facts Showing Unjust Enrichment Of ATTM.

Plaintiffs' claim for unjust enrichment (MCC at ¶¶ 170-175) fails for two reasons: (a) as to California plaintiff Hanna, there is no independent cause of action in California for unjust enrichment, and the laws of non-California plaintiffs Weisblatt, Turk and Osetek's home states do not permit unjust enrichment claims where there is a contract governing the relationship between the parties; and (b) none of the plaintiffs paid ATTM any amount for their 3G-enabled iPads, and they allege no facts supporting their theory that ATTM was unjustly enriched by payment of an additional $130 to Apple or Best Buy for the 3G-enabled iPad.

A. There Is No Cause Of Action Under California Law For Unjust Enrichment.

Plaintiff Hanna cannot state a claim for unjust enrichment because "there is no cause of action in California for unjust enrichment." *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 794 (2003). "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." *Lauriedale Associates, Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1448 (1992). "Unjust enrichment is a 'general principle, underlying various legal doctrines and remedies,' rather than a remedy itself. It is synonymous with restitution." *Melchior*, 106 Cal. App. 4th at 784 (quoting *Dinosaur Dev., Inc. v. White*, 216 Cal. App. 3d 1310, 1315 (1989)).

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[9] In addition, these plaintiffs' choice of law provisions in their contracts with ATTM preclude their California statutory claims. *See, e.g.*, *Melt Franchising, LLC v. PMI Enters., Inc.*, 2009 WL 32587, *3 (C.D. Cal. Jan. 2, 2009) (dismissing UCL and CLRA claims where Massachusetts law applied pursuant to a choice-of-law provision).

Following *Melchior* and *Lauriedale,* district courts in California have dismissed unjust enrichment claims with prejudice, particularly where, as here, the claim is merely duplicative of other fraud or consumer claims under the CLRA, UCL or FAL. *See Newsom v. Countrywide Home Loans, Inc.*, 714 F. Supp. 2d 1000 (N.D. Cal. 2010) (following *Melchior* and dismissing unjust enrichment claim based on same allegations supporting UCL claim); *Rosal v. First Federal Bank of California*, 671 F. Supp. 2d 1111 (N.D. Cal. 2009) (same); *accord Smith v. Ford Motor Co.*, 2010 WL 3619853 *14 (N.D. Cal. Sept. 13, 2010); *Leong v. Square Enix of America Holdings, Inc.*, 2010 WL 1641364 *9 (C.D. Cal. April 20, 2010).

B. Plaintiffs Cannot Maintain A Claim For Unjust Enrichment Where There Is A Contract Governing The Subject Matter Of The Claim.

Plaintiffs Weisblatt, Turk and Osetek cannot state claims for unjust enrichment because the laws of their states do not permit a claim for unjust enrichment where a plaintiff seeks recovery for events arising from the same subject matter governed by a contract. *See, e.g., Singer Asset Fin. Co. v. Melvin*, 822 N.Y.S.2d 68, 71 (App. Div. 2006) ("recovery for unjust enrichment is barred by the existence of a valid and enforceable written contract."); *MacDonald v. Hayner*, 715 P.2d 519, 523 (Wash. App., 1986) (party to a contract may not ignore the contract and bring an action for unjust enrichment); *Zarum v. Brass Mill Materials Corp*., 134 N.E.2d 141, 143 (Mass. 1956) (no cause of action for unjust enrichment where relationship of parties governed by contract). Weisblatt, Turk and Osetek each admittedly entered into service agreements with ATTM governing their 3G wireless service (MCC at ¶¶ 57, 72, 74, 81), and thus cannot advance claims for unjust enrichment.

C. Plaintiffs Have Not Alleged And Cannot Allege Facts Showing Unjust Enrichment Of ATTM.

The claim for unjust enrichment also fails as to all plaintiffs because they have not alleged and cannot allege any unjust enrichment of ATTM by their decision to purchase a 3G-enabled iPad. *See In re Accuray, Inc. S'holder Derivative Litig.*, 2010 WL 3447615 * 14 (N.D. Cal. Aug. 31, 2010) (dismissal of unjust enrichment claim warranted where plaintiff fails to show how defendant was unjustly enriched at the plaintiff's expense); *c.f. Nelson v. Sperling*, 270 Cal. App. 2d 194 (1969) ("Restitution means that the defendant must hand back to the plaintiff what the defendant has received from the plaintiff in the transaction."); *Rains v. Arnett*, 189 Cal. App. 2d 337, 343 (1961) ("[N]o recovery for money had and received can be had against a defendant who never received any part of the money or equivalent thing sued for.").[10]

Plaintiffs allege that they paid "an additional $130 for . . . 3G capability" and that they paid "more than [they] otherwise would have for [their] iPad" as opposed to a less expensive WiFi iPad. MCC at ¶¶ 4, 60; *see also id.* at ¶¶ 53, 63, 67, 77, 84. Plaintiffs allege that they bought their more expensive 3G-enabled iPads from Apple (or in plaintiff Hanna's case, Best Buy), not ATTM. *Id.* at ¶¶ 53, 61, 63, 78. There are no allegations that ATTM received any portion of the $130 additional payment.[11] There is therefore no basis for plaintiffs' unjust enrichment claims against ATTM.

V. Plaintiffs' Claims Under The UCL and FAL Fail Because They Lack Standing To Seek Restitution From ATTM.

The UCL and FAL "limit standing to individuals who suffer losses . . . that are eligible for restitution." *Buckland v. Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 817, 819 (Cal. App. 2d. 2007). Plaintiffs whose losses are ineligible for restitution also lack standing to bring a claim for injunctive relief under the statutes. *See Sullins v. Exxon/Mobil Corp.*, 2010 WL 338091 *4 (N.D.

[10] The law of New York, Washington and Massachusetts also provides that no claim for unjust enrichment lies against a defendant who never received the money sought in restitution. *See Desanctis v. Labell's Airport Parking, Inc.*, 1991 WL 71921, *4 (Mass.App.Div., 1991) (unjust enrichment requires defendant to return a benefit received from the plaintiff); *accord IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 879 N.Y.S.2d 355, 361 (N.Y., 2009); *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 810 P.2d 12, 18 (Wash. App., 1991).

[11] Although plaintiffs also make conclusory allegations that they paid more for "related services" than they otherwise would have, were "denied important benefits" and "will be assessed excessive charges for downloading data to [their] iPad[s]," they provide no facts to support those allegations. MCC at ¶¶ 60, 67, 77, 84. The allegations therefore fail under *Iqbal*. *See Iqbal*, 129 S. Ct. at 1949.

Cal. Jan. 20, 2010) ("Because plaintiffs are not entitled to restitution, they lack standing to bring a claim for injunctive relief . . . .").

A plaintiff cannot obtain restitution from a defendant to recover payments that the plaintiff made to other entities. *See Bowler v. Home Depot USA, Inc.*, 2010 WL 3619850 *5 (N.D. Cal. Sept. 13, 2010) (no standing to assert UCL claim because "Plaintiff's 'lost money' went to [third-party] medical practitioners and did not unjustly enrich the Defendant."); *Sullins*, 2010 WL 338091 at *4 (dismissing UCL claim based on allegation that plaintiffs were entitled "to the return of money they paid to any third party as a result of defendant's unfair business practices."); *see also Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025 (9th Cir. 2009) (finding that because defendants had no money or property belonging to plaintiff, plaintiff could not state a claim for restitution and thus lacked standing under the UCL). Here, plaintiffs base their claims on allegations that they paid Apple or Best Buy $130 more for the 3G-enabled iPad than they would have paid if they had bought the less expensive WiFi iPad. MCC at ¶¶ 4, 53, 60, 61, 63, 78. Plaintiffs are therefore not entitled to restitution from ATTM, and under *Bowler* and *Sullins* lack standing to assert claims against ATTM under the UCL or FAL.

VI. Plaintiff Weisblatt's Negligent Misrepresentation Claim Fails Because He Cannot Establish A Special Relationship With ATTM.

Under New York law, which governs Weisblatt's claim, "there is no action for negligent misrepresentation of a promise of future conduct unless there is a special relationship between the parties." *Computech Int'l, Inc. v. Compaq Computer Corp.*, 2002 WL 31398933 *5 (S.D.N.Y. Oct. 24, 2002). Ordinary buyer-seller relationships such as the one in this case are not special relationships that permit a cause of action for negligent misrepresentation. *See Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 788 (2nd Cir. 2003) ("[T]he law of negligent misrepresentation requires a closer degree of trust between the parties than that of the ordinary buyer and seller . . . ."); *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 63 (2nd Cir. 1988) (special relationship exists "when the parties' relationship suggests a closer degree of trust and reliance than that of the ordinary buyer and seller"). Because Weisblatt has failed to allege anything other than a typical buyer-seller relationship, his negligent misrepresentation claim must be dismissed.

VII. The CLRA Claim Fails Because Plaintiffs Did Not Comply With The Affidavit And Notice Requirements.

A. All Plaintiffs Failed To File The Required Affidavits.

California Civil Code section 1780(d) states that a plaintiff seeking relief under the CLRA must file, concurrently with the complaint, an affidavit stating facts showing that the action has been commenced in the appropriate county. Cal. Civ. Code § 1780(d). If a plaintiff fails to file the required affidavit, the court "shall" dismiss the action. *Id.*; *see also In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 2010 WL 4892114, *10 (S.D. Cal., Nov. 30, 2010) (dismissing CLRA claim in consolidated class action complaint where plaintiffs failed to provide required affidavit). Here, the CLRA claims must be dismissed as to all plaintiffs because they did not file the required affidavits.

B. Plaintiff Osetek Also Failed To Serve A Notice Of Violation Letter On ATTM.

Under the CLRA, a plaintiff must provide a company with thirty days notice of the specific alleged CLRA violations by certified registered mail before filing a CLRA claim for damages. Cal. Civ. Code § 1782(a). Both state and federal courts require strict, literal conformance with CLRA's notice requirement. *See Laster*, 407 F. Supp. 2d at 1195-96 ("Strict adherence to the statute's notice provision is required to accomplish the Act's goals."); *accord Outboard Marine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 40-41 (1975). CLRA claims for damages brought by plaintiffs who fail to comply with section 1782's notice requirement must be dismissed. *See, e.g., Laster*, 407 F.Supp.2d at 1196; *Cattie*, 504 F. Supp. at 950. In this case, plaintiff Osetek sent a notice of violation solely to Apple, and not to ATTM, requiring dismissal of her CLRA claim for damages. MCC at ¶ 150.

CONCLUSION

For the foregoing reasons, ATTM respectfully requests that the Court dismiss with prejudice the First Amended Complaint in its entirety.

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